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**Municipal Government in a  
New Canadian Federal  
System**

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**Second Report  
of the  
Resource Task Force  
on Constitutional Reform**

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**Federation of Canadian  
Municipalities  
Ottawa, 1982**

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MUNICIPAL GOVERNMENT IN A NEW  
CANADIAN FEDERAL SYSTEM

SECOND REPORT

FEDERATION OF CANADIAN MUNICIPALITIES

OTTAWA

RESOURCE TASK FORCE ON CONSTITUTIONAL REFORM

Chairman: Edward McWhinney, Q.C. (Vancouver)

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JUNE, 1982

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federation of canadian municipalities  
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## FOREWORD

To the members of the Federation of Canadian Municipalities and  
Delegates to the 45th Annual Conference:

I am pleased to accept the *Second Report of the Task Force on Constitutional Reform* as a useful discussion paper for the 1982 Conference.

The first volume of *Municipal Government in a New Canadian Federal System* which was presented to the 43rd Annual Conference held in Halifax in June, 1980, examined the present status of municipalities in Canada, and pinpointed the need for municipal governments to be granted three constitutionally-recognized autonomies: fiscal, legislative and institutional.

The second volume confirms and updates the conclusions of the first *Report* and suggests future action for municipalities, now that the Constitution of Canada has been patriated and the Canadian Government is preparing to proceed with the provinces to the next phase of constitutional renewal.

In order to govern effectively, local authorities should possess the necessary financial resources and legislative powers; the two volumes of *Municipal Government in a New Canadian Federal System* will provide guidelines for achieving these goals, and will serve as an important basis of discussion of municipal issues and intergovernmental relations.

My colleagues on the National Board of Directors and I extend our thanks to the members of the Resource Task Force on Constitutional Reform and to its Chairman, Dr. Edward McWhinney, for their work on the Federation's behalf. We wish also to express our appreciation to the members of the FCM's Standing Committee on Constitutional Reform and Revenue Sharing for their assistance.

DANIEL BROWNLOW  
Mayor, city of Dartmouth, Nova Scotia  
FCM President

April 1, 1982

## PREFACE

Canadian municipalities didn't do too well during the first phase of the making of our new Constitution. We are still tucked into Section 92(8) of the British North America Act (now called the Constitution Act, 1867) as "municipal institutions" in relation to which provincial legislatures "may exclusively make laws".

FCM's job in *Phase Two* of Constitution-making -- concerned with the basic institutions and structures of government as is explained in this report -- is to ensure that municipalities burst out of Section 92(8) into a new recognition that there are three essential kinds of government in Canada, none more valid than the others.

History buffs know that the Fathers of Confederation wanted the provinces to act like big cities rather than like little nations. One of our jobs in the next phase of Constitution-making might be to respect the Fathers' vision of Canada, not so much by making our provinces into big cities as by making our big cities into provinces.

Whatever axe you want to grind for constitutional wood-chopping, I recommend this report to you. It will tell you where we are, and how far we have to go.

RICHARD GILBERT  
Alderman, City of Toronto, Ontario  
Chairman, the FCM's Standing  
Committee on Constitutional Reform  
and Revenue Sharing

April 1, 1982

## INTRODUCTION

The Resource Task Force on Constitutional Reform was created by the Federation of Canadian Municipalities in January, 1979, as a specialist, technical (non-political) expert group to aid the Federation in developing its own constitutional position in the then current federal-provincial inter-governmental discussions and negotiations relating to the renewal and modernization of the Canadian Constitution and the Canadian federal system as a whole. The Resource Task Force was responsible and also reported directly to the Task Force on Constitutional Reform, selected by the Executive Committee of the Federation from the ranks of mayors and elected aldermen and councillors and headed by the former mayor of Vancouver, Jack Volrich. The report of the Resource Task Force - hereafter referred to as the *First Report* - containing detailed research papers, conclusions and recommendations - was published in May, 1980, and formally received and debated *in extenso* at the Annual Conference of the Federation held in Halifax in June, 1980.

In late 1981, the Federation's Executive Committee decided to reactivate its work on constitutional change in Canada and the special role of the municipalities in the new or renewed Canadian federal system expected to emerge as the result of *Phase Two* Constitution-making. (*Phase Two* will be the second, much more detailed process of constitutional change, focussing on the basic institutions and structures of government, the different levels of government, and also the division and sharing of law-making competences and fiscal (taxing) powers within the federal system. The Federal Government had previously indicated that this process would follow the successful completion of *Phase One* Constitution-making, that is, the Constitutional Patriation Project of 1980-81: the patriation of the B.N.A. Act and the adoption of a constitutionally entrenched Charter of Rights and Freedoms and of a new, wholly Canadian constitutional amending machinery for the future.)

To this end, the Federation's Executive Committee created a new committee in place of the earlier Task Force - the Standing Committee on Constitutional Reform and Revenue-Sharing, headed by Alderman Richard Gilbert of Toronto, and comprising Mayor Dominique Grenier of Shawinigan, Quebec, Alderman John Oldring of Red Deer, Alberta, Councillor Andy Wells of St. John's, Newfoundland, and Councillor D.A. Yanofsky of Winnipeg, Manitoba. The specialist, technical, expert group - The Resource Task Force on Constitutional Reform - though it had completed its original mandate with the presentation of its *First Report* in May, 1980, had not been dissolved; it had been "continued" pending any action by the FCM on the *First Report* and also further developments in the federal-provincial intergovernmental negotiations on *Phase One* Constitution-making.

In November, 1981, Alderman Gilbert as Chairman of the new Standing Committee requested the Resource Task Force to resume its research and to prepare a fresh, supplemental study with recommendations within the scope of *Phase Two* Constitution-making. The ensuing report would provide the basis of discussion and debate on constitutional change and the future role of Canada's Municipalities, at the Annual Conference of the Federation to be held in Ottawa in June, 1982.

The Resource Task Force met with Alderman Gilbert in Toronto on January 21, 1982. The report that follows is the product of the instructions given in November, 1981 and at the Toronto meeting in January, 1982. While it would have been possible for the Resource Task Force simply to prepare a revised edition of the original May, 1980 report incorporating new research and new proposals in response to supervening political and constitutional developments, it was decided to prepare instead a new and separate report, complete and self-contained in its own right. The original report would remain unchanged. The two reports, the *First Report* and the present, *Second Report*, thus stand together and are in fact, fully complementary. The membership of the Resource Task Force remains unchanged for both the *First Report* and the *Second Report*, save that, for professional reasons, Dale Gibson of Winnipeg was not able to be directly involved in the discussions and researches and preparation of the *Second Report*.

EDWARD McWHINNEY  
Chairman  
Resource Task Force on  
Constitutional Reform

## CHAPTER 1

### THE MUNICIPALITIES AND PHASE TWO CONSTITUTION-MAKING

...Edward McWhinney

The Report, "*Municipal Government in a New Canadian Federal System*", was officially published in May, 1980, immediately prior to the Quebec "Sovereignty-Association" Referendum (held on May 20, 1980). The Report was the product of the Resource Task Force on Constitutional Reform, which was named by the Federation of Canadian Municipalities in January, 1979, as a politically-neutral, technical-scientific, research and study group formed, with the one exception (Mayor Brian Smith of Oak Bay, B.C., who resigned on being elected to the provincial legislature and becoming a provincial Cabinet Minister) from outside the ranks of the politically-elected members of municipal government. The liaison between the Resource Task Force and the main political arms of municipal government--here, specifically, the Executive of the Federation of Canadian Municipalities--was provided by a parallel committee, the Task Force on Constitutional Reform, recruited directly from the elected Mayors and Aldermen and chaired throughout the relevant time period, by former mayor Jack Volrich of Vancouver. Contact between the Resource Task Force and the main Task Force was continuing and close, but the main Task Force always respected the technical-scientific role and character of the Resource Task Force and never attempted to influence or control its final conclusions and recommendations which remained its own work.

Mention of the key dates above--formation of the Resource Task Force in January, 1979, with instructions to report back, in final form, in time for the June, 1980 Annual Conference of the Federation of Canadian Municipalities, to be held in Halifax, is crucial to understanding the general constitutional climate in which the Resource Task Force's work was undertaken and achieved. At the opening of 1979, the federal "Long Parliament", elected in 1974, was clearly bound to come to an end, for Prime Minister Trudeau could not postpone the general elections beyond mid-year. The Prime Minister had, in response in considerable measure to the election of the separation-committed *Parti-québécois* Government in the Quebec general elections of November, 1976, undertaken a comprehensive programme of constitutional change whose main outlines were put forward in the Federal Government's Draft Constitutional Amendment Bill, introduced in the federal Parliament in 1978. The Federal Government project seemed designed as a stimulus for public discussion and debate on the need for constitutional reform, or even as a negotiating text directed to other political players in the constituent process that it was hoped to initiate, rather than as a finished product intended for immediate adoption. It was soon caught up in a constitutional challenge

as to that part of it that touched on Senate reform, the Federal Government having reluctantly agreed, in response to Opposition pressures, to refer this issue to the Supreme Court of Canada for advisory opinion as to its constitutionality. The Supreme Court eventually - in December, 1979 - ruled those particular sections of the Constitutional Amendment Bill to be unconstitutional [*Reference re Legislative Authority of Parliament to alter or replace the Senate*, 102 D.L.R. (3d) 1 (1979)]; but, by that time, the whole issue had become academic, the Trudeau Government having been defeated in the federal general elections of May, 1979 and replaced by the Clark Progressive Conservative Government. The Constitutional Amendment Bill itself, not having as yet been finally adopted by the "Long Parliament", lapsed with that Parliament.

While the new Clark Government announced its own commitment to constitutional change and created a committee under newly-appointed Senator A. Tremblay to undertake such a project, nothing definitive had emerged by the time of the Clark Government's Budget debate defeat in December, 1979, and its subsequent defeat in the ensuing federal general elections of February, 1980, and its replacement by a renewed Trudeau Liberal Government.

The main political attention in Canada, in the Spring of 1980, was directed to the run-up campaign for the Quebec "Sovereignty-Association" referendum. In addition to the main Quebec protagonists, Government and Opposition, Prime Minister Trudeau and four of the provincial Premiers intervened directly in the Quebec referendum campaign and publicly committed themselves to the cause of constitutional change and a "renewed" federalism, if only Quebec would vote against the *Parti-québécois* "Sovereignty-Association" proposal. The constitutional promises from the federal Prime Minister on behalf of a "renewed" federalism could presumably be viewed in the larger context of his abortive Constitutional Amendment Bill, 1978, and its larger, more comprehensive approach to constitutional change. The four English-speaking provincial Premiers were rather more vague and un-specific as to their program of constitutional reform for Canada; but presumably they were not limiting themselves to "language" reform on which, in view of past provincial attitudes (apart from New Brunswick) against provincially-entrenched French-English bilingualism, provincial political action could hardly be expected in the immediate future.

The political situation, in the spring of 1980, thus looked favourable to a more generalized and comprehensive program of constitutional reform, covering institutions and law-making competences and relations among the different levels of government, and of which municipal and local government would necessarily be a part.

\* \* \* \* \*

The Resource Task Force's *First Report*, prepared against a background of these rapidly changing political events, from January, 1979 to May, 1980, had only one constitutional constant that it could accept as a working hypothesis. In fact, this had been postulated for the Task Force in advance, in the original mandate and terms of reference established by the FCM Executive - namely, the notion of some comprehensive constitutional change within Canadian federalism in the future, with municipal government and

the relations among the three levels of government (federal, provincial, and municipal) included therein. It could not be foreseen at the time whether the emphasis and direction of future constitutional change would involve a further strengthening and extension of federal powers, necessarily involving some diminution of the provinces' constitutional role; or whether the trend would be the other way, towards provincial claims; or whether indeed, there would be a complete restructuring, involving entirely new (in a Canadian context) concepts of regionalism and reallocation of community decision-making power between central and local authority. Nor could it be foreseen, at the time, whether the strategy of future constitutional change would involve the holistic (all-in-one act or one-step) approach or more pragmatic, step-by-step, piecemeal methods. Sensibly, therefore, the Resource Task Force resolved to follow a constitutionally wise course, and set out in its report a logical and valid case for recognizing municipal governments in a renewed Canadian Constitution. The Task Force based its case on empirical study and evaluation of comparative Canadian and foreign experience with municipal government in the contemporary period. But it left open the precise modalities or choices for its constitutional achievement within a "renewed" Canadian federal system of the future. This is why both the Draft Resolution on the constitutional position of *Municipal Government in a New Canadian Federal System* (set out on pp. 125-6 of the *Report*) and also the *Model Constitutional Articles* (federal and provincial, set out on pp. 153-5 of the *Report*) look to complementary constitutional action at both the federal and the provincial levels, directed towards this end. If the Draft Resolution and the Model Constitutional Articles are thus predicated upon a cooperative (intergovernmental) federalism premise, it is clear that, in constitutional ideal-type terms alone, the substantive constitutional changes envisaged could be achieved, equally, in wholly federal or wholly provincial constitutional terms, if political developments warranted that. The Resource Task Force also consciously avoided any recommendation that reform of municipal government be linked in a single package with all other constitutional reforms, so that it would necessarily stand or fall with those other projected changes.

\* \* \* \* \*

As it happens, political events since the Resource Task Force *Report* was officially submitted, in May, 1980, have clarified or refined some of the issues of political choice that necessarily conditioned the constitutional strategy and also the substantive legal principles contained in its recommendations. Those political events may be summarised briefly hereunder: the Quebec Referendum vote of May 20, 1980, defeat of the "Sovereignty-Association" proposal, and positive commitment of the Federal Government to programmatic change; the choice of federal-provincial intergovernmental diplomacy and negotiation as the instrument of such constitutional change, and its practical breakdown in September, 1980; unilateral federal action, through a Joint Resolution of the two federal Houses of Parliament that was limited, however, to the three issues of formal repatriation of the B.N.A. Act from Great Britain, the adoption of a constitutional amending machinery for the future, and the adoption of a constitutionally entrenched Charter of Rights; an all-Party agreement to delay final action on the Parliamentary Joint Resolution, pending Court ruling on constitu-

tionality; *reprise* of federal-provincial intergovernmental diplomacy after the Court ruling in September, 1981, followed by a final agreement on a modified "patriation package" (that was still limited, however, to the three issues indicated above), and then final adoption of the revised joint Resolution by the federal Parliament and its transmission to Great Britain, for formal enactment, in December, 1981.

All this has tended to resolve the dilemmas of choice of constitutional strategy in the following respects. First, although the prolonged battle over the patriation package raised great political controversy, it was, in strictly constitutional-legal terms, a quite limited and concentrated, selective approach to constitutional novation, not directly touching on institutions or law-making competences within the federal system. If successful achievement of the patriation package can be viewed as an important step in the evolution of Canadian constitutionalism, it is still only a *first* step; it must be followed up by further proposals, directed this time to institutions and law-making competences and the basic structures of government, if any substantial renewal or modernization of Canadian federalism is to be achieved in the future. The Prime Minister has announced his Government's commitment to a *second phase* of Constitution-making, following on formal patriation of the B.N.A. Act from Great Britain with the new constitutional amending formula and the new Charter of Rights; and there may have to be further phases after that if the *second phase*, in its turn, is not comprehensive but itself limited to a few selected items deemed to be of high political priority. If those proponents of an improved constitutional status for municipal government within a new or "renewed" Canadian federal system wish to see early action towards this end, then they must direct their attention to the main political-governmental arenas. There, they may be able to ensure that there will, indeed, be a *second phase* Constitution-making, that it will occur in timely fashion, and that municipal government will be included in its agenda.

Second, the method and procedures of constitutional change for the future, after the patriation package comes into force, are now controlled by the revised constitutional amending machinery agreed upon by the Federal Government and nine of the ten provincial Premiers as part of the November 5, 1981, final political compromise and then incorporated into the revised patriation package itself. The salient points of that intergovernmental compromise as to the amending formula are the disappearance of the proposal for popular consultation, by way of referendum vote, in case of deadlock; and the disappearance, effectively, of what has been called the historic Quebec and Ontario "veto" right over projected constitutional changes. Henceforward, amendments to the Constitution of Canada require (under Section 38(1) of the Canada Act, contained in the Patriation Resolution):

- a) resolutions of the Senate and House of Commons; and
- b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least 50 per cent of the population of all the provinces.

In addition (under Section 38(2)), an amendment made under the foregoing that--

derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or Government of a province shall require a resolution supported by a majority of the members of each of the Senate, the House of Commons and the legislative assemblies required under [Section 38(1)] .

Under Section 38(3), such an amendment as described in Section 38(2)--

shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members...

Other, relevant provisions under this, Part V (*Procedure for Amending Constitution of Canada*) of the Canada Act, contained in the Patriation Resolution, are Section 42(1)(f) and Section 45. Section 42(1)(f) concerns--"the establishment of new provinces", and subjects that to the ordinary amending procedure established under Section 38(1), *above*. Section 45 stipulates that--

the legislature of each province may exclusively make laws amending the constitution of the province --

in fact, a reaffirmation of the legal situation existing before the Patriation Resolution.

\* \* \* \* \*

The consequences of the new amending procedures are that any general constitutional entrenchment of the municipalities in the Canada Act (including law-making and taxing powers) would first require passage of a constitutional amendment by both Houses of the federal Parliament. This would then have to be followed by passage of similar resolutions by at least seven of the provinces having at least 50 per cent of the total population of all provinces. (This would mean that either Quebec or Ontario, though not necessarily both, must be among the required minimum number of seven provinces). In addition, any province wanting to resist any such general constitutional entrenchment of the status and powers of municipal government could, in effect, opt out of its application by using the special dissenting vote of its own provincial legislature. The onus would be on that province to demonstrate that such constitutional entrenchment would--"derogate" from the "legislative powers, the proprietary rights or any other rights or privileges of the legislature or government" of that province. Such a provincial stance could also be subject to judicial review in a possible testing before the Courts.

On the other hand, there is nothing to stop any province from legislating to amend the constitution of its own province so as constitu-

tionally to entrench in the provincial constitution the status and powers of municipalities within the province. Such provincial constitutional entrenchment would be effected by ordinary legislation of the province or provinces concerned. Its main practical defect would be the political one that it would be subject to amendment or repeal in the same way in which it had been created in the first place - by ordinary legislation of the province or provinces concerned.

There is no need to canvass, at this stage, the constitutional requirements for adoption of particular proposals that have been advanced, from time to time, for changes in the status of municipal government in Canada. It may be noted, however, that the West German model, of elevating particular municipalities - (the great urban concentrations in West Germany, i.e. Hamburg, Bremen, and Berlin) - into provinces in their own right, would require, if it were to be followed in Canada, the approval of the federal Parliament and at least seven of the ten provinces (including either Quebec or Ontario). Furthermore, any dissenting province adversely affected thereby (presumably, a province from whose territory the new city-province or city-provinces would be carved out) would have the right to effectively veto the proposal.

For all these considerations, it would seem that the political options of members of municipal government desirous of upgrading or improving the constitutional status of municipalities along the lines recommended in the *Report* are either to work to build the necessary federal-provincial intergovernmental consensus in support of such constitutional change, in order to benefit from the larger constitutional-legal protection of formal entrenchment in the federal Constitution; or else to settle for the very much lesser constitutional-legal protection involved in adoption under ordinary provincial constitutional law. What is clear, however, is that the effect of the last-minute, political changes to the constitutional amending formula in the Patriation Resolution is to ensure that federal constitutional change in the future will be negotiated in federal-provincial intergovernmental arenas and will proceed, if it is to proceed at all, from a fairly substantial intergovernmental consensus therein. In practice, any such fairly substantial intergovernmental consensus may be difficult to achieve and consume very much time and energy and build great delays in the process. The Canadian Constitution, under the new amending formula, is likely to prove rigid, and not flexible, in its practical development. This means that the more modest type of constitutional change, through the ordinary provincial political processes alone, may often be the better approach to follow. For that reason, in spite of its relatively weak legal protections, its pragmatic advantages should not be overlooked. The political opportunities for the municipalities, -granted the increasing urbanization of Canadian society and the consequent preponderant place of the cities and towns and their voters in federal and provincial politics today - of maximizing their role in promoting a new Canadian constitutional consensus that will include new directions in municipal government and in intergovernmental (federal, provincial, and municipal) relations, should not be underestimated, though it lies outside the scope of the present analysis to pursue them.

## CHAPTER 2

### POLICIES AND PRACTICES IN ATLANTIC CANADA, ONTARIO, AND THE WEST

...Lionel D. Feldman

#### INTRODUCTION

The initial material on the policies and practices of provincial governments in the East, Ontario, and the West with respect to municipalities and the Constitution appeared as Chapter 3, (pages 47-60) in *Municipal Government in a New Canadian Federal System* released by the Federation of Canadian Municipalities, Ottawa, in May 1980. What follows is an update of activities, where relevant, in the same provinces to January 1982.

The methodology to gather the data utilized now is very similar to that of 1980. Interviews with provincial government officials and knowledgeable academics were carried out in Ontario, British Columbia and Alberta. In these provinces and in Atlantic Canada, telephone interviews were conducted with members of various municipal associations, other academics, and civil servants.

Current literature, especially speeches and statements which appeared in the media have been reviewed and other materials have been examined. As some material is taken from secondary sources, namely media accounts of Ministers' speeches; therefore, to an extent, a caveat must be observed. The original speech either was not available or could not be readily acquired, hence, reliance is on an edited version of comments. As in 1980, due to the fact that many of the interviews were with civil servants, comments cannot be attributed.

While more provincial governments have made formal statements of policy with respect to their position on the role of municipalities and the Constitution by 1982, in the majority of cases examined, policy has not been explicitly articulated. Again, as was the situation in 1980, the lack of a formal statement cannot be construed as representing the absence of a policy. This vacuum is a stark reminder of just how municipalities are viewed by these provincial governments - that is, as being subordinates to the province.

Only in those provinces where either there has been a change in position, or, where a formal position now has been taken in detail provided. In the intervening two years there has been a slight shift in the position of some provinces and comments are offered on these.

#### THE POSITION OF THE FEDERAL GOVERNMENT

As a marked departure in attitude, the speech given by the

Minister of Public Works, Government of Canada at the 1981 Regina FCM Conference is noteworthy. Whether a great deal of significance should be attached to it is unclear at this point in time. Nevertheless, it is one of the rare major statements from a federal Cabinet Minister on the topic of municipalities in the Constitution since the 1979 demise of the Ministry of State for Urban Affairs.

On June 10, 1981, the Honourable Paul Cosgrove said:

... When I entered the National Cabinet I did not abandon my long held conviction, for example, that Canadians are best served by cooperation by all levels of government.

Nor did I abandon my conviction that the role of local government is deserving and warrants a more secure place in the Constitution and a better share of tax resources to carry out its responsibilities. (p.6)

Later in his speech, the Minister speaks directly to the leadership of the FCM.

... It is my view that you should not abandon your campaign for a voice in the decision for a renewed Canada....I can assure you that you have one National Minister who would consider such a request to be music to my ears. I am prepared to support your point of view with my Cabinet colleagues and to discuss them with my provincial counterparts hopefully as a new stage in government relations begins after Patriation of the Constitution. (pp.7 & 8)

Hence, support for the FCM position is given by the Minister; however, it is timed to become a reality after patriation. The Minister commented later concerning upcoming discussions on fiscal arrangements between the provinces and Ottawa to which the municipalities, through the FCM, were urged to make representations. He reiterated his earlier pledge by saying "I am committed to support a heightened role for local government both in the constitutional and fiscal areas" (p.10). These exceptionally strong statements must be put in perspective and carefully weighed.

In a letter to the author, however, dated August 26th, 1981, Mr. Cosgrove writes that: "I am also pleased that the Prime Minister has responded favorably to my comments," that is, to his 1981 FCM speech. This is certainly not a sufficient basis in which to speculate on the position of the Government of Canada. What this reported exchange does do, is reinforce the views of some provinces, especially Alberta and British Columbia, that in certain areas Ottawa will for expediency's sake or to make a point, or when it suits its interests, deal directly with municipalities. Both provincial governments, even more so than Ontario, seem to be especially vigilant about federal initiatives into what are considered exclusive provincial jurisdictions.

Another member of the federal Cabinet appeared on the 1981 FCM

program. On June 9, 1981 the Honourable Judy Erola, Minister of State (Mines) in the text of her speech, was concerned solely with energy matters. The *Globe & Mail* of June 11, 1981, in a story after Mr. Cosgrove's speech, however, reports Mrs. Erola as saying: "I don't think it is necessary to have municipalities formally recognized ... but ... the door is not completely closed". Further, Mrs. Erola is reported as saying that the Cabinet is divided on "...what status should be accorded municipal governments." (p.4) Closer examination of the statement suggest that the Minister has probably been misquoted. It is much more likely that she said "whether" status should be accorded rather than "what" as has been reported. Nothing more on the views of the Government of Canada with respect to its position on municipalities and the Constitution has been forthcoming since 1981. It would probably be unwise to attribute too much significance to these comments by Mr. Cosgrove and Mrs. Erola. Nevertheless, given the form, audience, and timing, the combined remarks could be viewed as a positive indication that, for whatever reason, in 1981, the Federal Government was prepared to consider the views of the municipalities.

#### THE POSITION OF PROVINCES WITH RESPECT TO MUNICIPALITIES AND THE CONSTITUTION: JULY 1980 - JANUARY 1982

##### NEW BRUNSWICK

At the autumn 1980 Conference of the Towns of New Brunswick Association, Premier Richard Hatfield was the keynote speaker. He is reported as remarking that until the May 1980 FCM Report was shown to him, he had never really thought about a role for municipalities in the Constitution. After some reflection, the Premier stated that his government "...was firmly of the opinion that local government should remain a subordinate government to that of the Province". Municipalities should not be "...a level of government like the federal and provincial". Further, he said "...it was not in the interest of citizens that cities should have the Constitutional position of extensive powers that some people and associations sought for them."

It would appear that Mr. Hatfield possibly has confused the issue as presented in the 1980 FCM Report. While the model article (pg. 155) did speak of municipalities as a "third level of government" it was not a level like the other two. Nevertheless, at least a position for the government of the province of New Brunswick has been formally and publically stated. There is no information as to whether the association itself has passed a resolution with respect to this matter.

##### ONTARIO

The Ontario position as always is complex. It represents a slightly different shade of opinion on the part of the provincial government, rather than a marked change. First, the position of the dominant municipal association in Ontario will be reviewed and then, the stance of the government itself will be discussed.

At the August 1981 annual conference of the Association of Municipalities of Ontario (AMO) the following resolution was adopted. There were no formal position papers prepared by Association staff in regard to this resolution although it had been processed through a committee of AMO. As well, there is a committee of AMO which meets from time to time and has been monitoring activities in this area.

The wording of the 1981 resolution is similar to that contained in the 1980 FCM document.

Be it resolved that the following principles should apply to the position and status of municipalities in any new or "renewed", Canadian Federal system:

1. The Constitution of Canada should expressly recognize and protect municipal government within the general system of a Federal Constitutional government established thereunder.
2. It is understood that within the Federal Constitutional system, a municipal government should fall within Provincial jurisdiction, except in respect to those constitutionally defined independent powers.
3. The Constitutions of the Provinces, within the Federal Constitutional system, should expressly recognize and protect the autonomy of municipal governments in the following areas:
  - (a) *Law-making autonomy*: Each municipality should have independent law-making powers in defined areas, which should not be withdrawn or varied by the Provincial governments, unless by the ordinary legal processes and procedures applicable to the amendments of provincial constitutions;
  - (b) *Fiscal autonomy*: Each municipality should have access to the financial resources appropriate to the carrying-out of its governmental responsibilities, and, to that end without limiting the foregoing, should have power to improve real-property, licence amusements, and rental taxes, and, subject to appropriate Provincial-Municipal tax-sharing arrangements, income tax;
  - (c) *Institutional autonomy*: Each municipality should have the power, subject to conformity to the general principles of democratic

constitutionalism set out in the Constitution of Canada and also in the relevant Provincial Constitution, to determine and review its own Municipal Charter.

The major deviation from the FCM model article is that this resolution deletes any mention of municipalities as a "third-level of government". In a preceding resolution, however, adopted on the patriation of the BNA Act the following section appears.

5. Consideration should be given to including within a new Constitution a defined role and responsibility for municipal governments in Canada.

The avoidance of any mention of municipalities as a "third level of government" quite likely is due to the composition of AMO. The Association has as members all types of municipalities. Many of the rural/farm municipalities have a completely different view of their position *vis-à-vis* the province than do many urban centres. As the AMO committee dealing with the Constitution is urban oriented, it is reasonable to speculate that the wording of the resolution was carefully framed to avoid at this time any unnecessary confrontation with other members.

Unlike 1980 no longer is Ontario's position with respect to municipalities and the Constitution to be found through the careful examination of actions over intergovernmental issues. While, perhaps, the result has not changed to any great extent in the intervening period, both the forum for the comments and the speaker are reason for a closer look at substance.

In a curious reversal of order and roles, the Minister of Municipal Affairs and Housing is quoted as saying that he concurs in the statement by the Deputy Minister of Intergovernmental Affairs as to what official Ontario government policy is on municipalities and the Constitution.<sup>2</sup>

Moreover, the Minister states "we do not intend to press to have the municipalities recognized as an equal, or on any other given basis, other than that which is presently being recognized." The Deputy Minister of Intergovernmental Affairs' statement referred to, is taken from a speech made before the Ontario Organization of small Urban Municipalities Conference, May 1981 and was subsequently reported in *Municipal World*.

The actual text of the speech is quoted here. Essentially, the position is the orthodox Ontario stance. There is no common interest between all municipalities in the provinces. The roles of provinces and the Federal Government should be adequately covered in a Constitution. The provincial-municipal relationship in each province should perhaps be worked out in "...a more formal framework..." to "...take on some aspects of the Constitution". Such a framework, however, "...would have to take account of the different capacities and needs of different types of municipalities...".

He then retreats somewhat from even this modest acknowledgement on certainty for municipalities in the provincial-municipal relationship when it is said: "Such a framework would have to take account of the different capacities and needs of different types of municipalities but I think we could all probably gain by having a more certain framework than we have at present."

While the speech directly refers to the 1980 FCM Report, its usefulness is downplayed:

Merely by saying in a constitution that municipalities have the right to levy property taxes or to regulate local activities will not change current realities and ... I don't think we can look forward to any likelihood that the Federation of Canadian Municipalities will be a twelfth seat around the constitutional table in the years to come.

This ascribing of a place for the FCM that has not been sought unnecessarily raises a red herring. What it does do, however, is strengthen a place offered to municipalities in the future strictly with a provincial-municipal framework. The Deputy Minister further states:

Once the Constitution is patriated there will be further discussions on matters touching various aspects of the distribution of powers. I cannot imagine the possibility of advanced Provincial-Municipal discussions on those aspects of the distribution of powers whose municipal delivery of services is a key component. I would hope ...there will continue to be Provincial-Municipal discussions keeping the Municipalities up-to-date on where the constitutional talks stand and insuring that there is a municipal input when there is direct relevance.

While this offers little more than what has been the position of Ontario in the years past, it is a slight departure. What it would appear to offer is the recognition that municipalities should have a prior right to convince the province of their position on substantive service questions. What is very carefully and firmly stated is that these are bilateral talks between Ontario and its municipalities. There is no suggestion of the municipalities having any role in federal-provincial talks on service issues of direct relevance to the municipalities. True, the observer role for a municipal representative is acknowledged.

The actual text of this speech, especially the beginning, is different from what has been published in a journal.

Mr. Stevenson says that had he been making his speech in 1980 he would have "been more confident" about the prospect of the role of

municipalities in the Constitution being seriously dealt with than he is in 1981. This is because he saw desire after the Quebec Referendum "...to get on with the job of getting on with all the items on the constitutional agenda". It was his view that in 1980 there was a prospect at least to explore the "potential for direct references to municipalities in the Constitution". In view of the actual occurrences at the time, one is forced to the conclusion that this represents a retrospective view of what might have been rather than a realistic acknowledgment of the circumstances at the time. This speech was given, of course, before the dramatic events of November, 1981. There is little however, to suggest that the role of municipalities in the Constitution has re-emerged on the Agenda of the Ontario government since that time.

#### SASKATCHEWAN\*

As the 1980 Report noted Saskatchewan was unique in that the Attorney-General had firmly stated the position of the province. Then, as now, Saskatchewan rejects any role for municipalities which would give them an entrenched place in the Constitution. As a result of the cancellation by the Prime Minister of his scheduled appearance as the keynote speaker for the 1981 Regina Conference of the FCM, Mr. Romanow spoke in his stead. This national platform of Canadian municipal leaders provided him with an opportunity to very clearly present the orthodox position and to reinforce both the Saskatchewan government's position and by inference, that of some other provinces.

Saskatchewan's two municipal associations have not changed their respective positions. The Saskatchewan Association of Rural Municipalities wholeheartedly supports the provincial stand. The Saskatchewan Urban Municipalities Association still has not taken any position on this question.

Prior to Mr. Romanow's 1981 speech, the FCM delegates had been informed that municipalities would not be allowed any representation at the annual meeting of the provincial Ministers of Municipal Affairs. Also the FCM presentation to Ottawa requesting that a new federal department to replace the disbanded Ministry of State for Urban Affairs be established had been rejected. The provinces claimed such a department would cause confusion and duplication.<sup>4</sup> Moreover, the then FCM President is quoted as saying that it was clear that municipalities had been "...left out in the cold on the Constitution".<sup>5</sup> (The federal response to the requests for establishment of a department with jurisdiction over municipal matters must be contrasted with the conciliatory comments made by the Minister of Public Works Canada.)

In his address to the FCM Conference in Regina on June 8, 1981, the Honourable Roy Romanow, Saskatchewan's Minister of Intergovernmental Affairs, focussed his remarks primarily on western Canadian views on constitutional reform. Mr. Romanow's speech devoted a considerable

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\*This report was written before the change of government in Saskatchewan. Whether the new government's attitude towards a municipal status in the Constitution will differ greatly from the former government's, is unknown.

amount of time to energy questions, the Charter of Rights and the amending formula. Only in the central part of his speech did Mr. Romanow turn to the role of municipalities in the Constitution. After arguing against entrenching rights in the Constitution because it means "making blanket rules", he says:

...If I may digress for a moment.... entrenching the status and role of municipalities might well introduce an undesirable uniformity in a nation with a multitude of different kinds of towns and villages. (p. 10)

The Minister acknowledges he is at "odds" with the 1980 Task Force Report and the 1980 Draft Resolution passed by the FCM. Moreover, he explicitly expresses approval with the 1980 position of the Saskatchewan Association of Rural Municipalities against entrenchment of municipal rights by quoting their brief when it says:

Not only would it be impractical and make agreement even more difficult if another level of government were to be added to the constitution. We believe that we as small local governments with small rural populations would lose out to the larger urban populated centers.

What is of considerable interest is that Saskatchewan's endorsement of the point that small municipalities will be swamped by the large, echoes Premier Hatfield's reasons for opposing a place for municipalities in the Constitution. Implicitly it picks up the Ontario theme as well.

A more interesting aspect of this speech by the Attorney-General for Saskatchewan is that it was claimed by the *Globe and Mail* that he spoke as an unofficial "chief spokesman for the provinces"<sup>6</sup>. Whether in fact this is correct is largely immaterial; what is certain is that his comments would not upset his provincial colleagues.

#### ALBERTA

There has been no change in the position of either the Alberta government or the Alberta Urban Municipalities Association (AUMA).

The province continues with a position that unless there is an absolute requirement as a result of either external or internal pressures, neither specific policy statements or legislation on the role or place of municipalities in the Constitution will be contemplated. There have been no specific statements made on Alberta's position that have been prepared or vetted by the Department of Federal and Intergovernmental Affairs. This is not to say, however, that individual Ministers have not from time to time quite possibly made casual references to the question. But the province as such has taken no explicit formal position.

With respect to the stance of AUMA this is not surprising. Calgary and Edmonton, while members of the Association, act on matters of direct concern to them independently. Moreover, Edmonton has had for some time a special office to deal with intergovernmental affairs; Calgary as well has specialist assistance. While neither of the two major cities is on record as to a position on municipalities and the Constitution to an extent their actions speak for themselves. Historically, neither Calgary or Edmonton has been reluctant to deal directly with Ottawa, such action often forcing the Province to take a stand. To expect other Alberta urban municipalities within the Association to find common ground on this question is not likely.

#### BRITISH COLUMBIA

There is no change in either the position of the government of the province of British Columbia or that of the Union of British Columbia Municipalities (UBCM). There is acknowledgement that specific ministries, especially Education and Municipal Affairs, have developed working relationships vis-à-vis dealings with Ottawa and federal dealings with local governments. Overall government policy is in total harmony with Saskatchewan's. The clear inference is that it has been dealt with in the same manner as it has in Alberta.

The concern and interest of the urban municipalities, especially Vancouver and New Westminster, on the constitutional issue has been sufficient to cause resolutions to be passed at the Annual UBCM Conferences.

The 1980 resolution, which was forwarded to the Premier and acknowledged by his office, endorsed patriation, a basic Bill of Rights, and an amending formula, and, as well, called for:

5. Consideration to be given to including within a new Constitution a defined role of responsibility for municipal governments in Canada.

The 1981 UBCM Conference in Nanaimo endorsed a strengthened resolution. It read:

#### CONSTITUTION FOR MUNICIPALITIES

WHEREAS the Federal Government is proposing the patriation of our Constitution and is proposing changes in that document:

AND WHEREAS the Provincial Government, quite rightly, feel that they are the body to represent more closely the wishes of the people of these provinces;

AND WHEREAS Provincial Governments, at present, dictate almost every decision at the municipal level, through Municipal Acts as well as others;

AND WHEREAS no Municipal Act can cover adequately the differing needs of different municipalities;

AND WHEREAS the present government of British Columbia is currently reviewing the British Columbia Municipal Act;

THEREFORE BE IT RESOLVED that the Union of British Columbia Municipalities bring to the attention of the Provincial Government that it is time that municipalities should be recognized by a Constitution which would delineate the areas of administrative authority and taxation that should belong to the municipalities exclusively.

Nevertheless, no attempt was made, or has been made by the UBCM to be more specific in terms of what range of authority or what fiscal resources should be made available to municipalities. That such a resolution would be endorsed by the conference is probably indicative of the fact that UBCM representatives want to have a position, but beyond the statement itself quite possibly the means to a common end is impossible to be agreed upon at present.

#### CONCLUSION

While it is true that, with the exception of a formal position now in place for New Brunswick and the official statement in Ontario, little has changed since 1980, there have been some slight shifts in policy.

The fact that the FCM itself has kept the municipalities and the Constitution as an agenda item, is significant.

The contrasting points of view were sharply defined at the 1981 Regina Conference. Here, a leading spokesman for the provinces on the whole issue of constitutional reform clearly stated that his government's view and by inference, other provinces' as well, rejected a separate place for municipalities. Through the FCM, however, Canadian municipalities continue to press for a place as a level of government in the constitution.

Curiously though, again at the 1981 Regina Conference though, two Ministers sent contradictory signals. One spoke of concern and need for a role for municipalities. The other Minister articulated the more orthodox federal position, namely scepticism about the necessity and utility of a special position for municipalities. The most obvious conclusion that can be drawn from these remarks by ministerial representatives of the Federal Government, is that (notwithstanding its refusal to re-establish a separate department to deal with municipal issues) the door to a future constitutional position for municipalities might not be firmly shut.

The very subtle shift in Ontario's position has importance for the future in that now the policy is stated the path ahead is clearer. This does not suggest that the orthodox stand is likely to be modified in the near future. What it indicates, however, and this in itself has significance, is that Ontario has given some thought to the ramifications of change. In Saskatchewan, Alberta, and British Columbia the provincial positions have not changed. Only in British Columbia, through the UBCM has the issue been kept alive albeit nothing has been done to elaborate upon the basic resolution by the municipalities.

On the other hand, it should not be forgotten that at the municipal level itself (while on a very much 'ad hoc' basis) individual municipalities continue to seek to forge separate and special positions. One example of this will serve to make the point. From 1977 to the present, the City of Windsor has developed an individualistic policy approach to intergovernmental affairs. While not expressly dealing with constitutional reform it does demonstrate how ongoing relationships can be dealt with if there is interest and initiative. Further, it shows that such relationships can continue, despite the expressed statements by federal and provincial governments. While the precise range of issues discussed in Windsor are not of concern here, the working arrangements are worth noting.

Since 1978, ten local tri-level meetings have been held in Windsor. These are unique in that:

...federal and provincial representatives do not represent "the government" but are instead members of Parliament and members of the Legislative Assembly whose ridings are, in whole or in part, in the City of Windsor ... These representatives then do not speak for the government but rather provide the local officials with more detailed information on the attitude of the government and their own analysis of what the City may expect in response to its requests.<sup>7</sup>

Moreover, the organization, the conduct of these meetings and the recording of minutes among other matters, are all handled by the city through the Chief Administrator's office. Quite possibly the Windsor format may offer an approach that could be taken by other urban centres in terms of focussing on the question of municipalities and the Constitution.

## CHAPTER 3

### MUNICIPALITIES AND THE CONSTITUTION - THE QUEBEC VIEWPOINT: AN UPDATE

...Yves Bériault and André Tremblay

#### SECTION 1 - LEGISLATION AND MUNICIPAL PRACTICES

Since the publication of our initial Report, legislative developments in the municipal sector have been relatively few. On the whole, they have had almost no impact on the constitutional question as such. However, mention might be made of two bills adopted by the National Assembly in 1980. The first concerned municipal democracy<sup>1</sup> and the second municipal fiscal matters<sup>2</sup>. This second bill continues the already established trend of granting municipalities wider financial autonomy.

Moreover, in 1981, Bill 33 entitled *An Act to amend various legislative provisions concerning municipalities* was tabled before the National Assembly. If passed, this bill will modify various laws affecting municipalities and particularly the *Cities and Towns Act*. On the whole, however, this bill involves changes of a technical nature having little bearing on the subject herein under consideration. Finally, in December 1981, the government of Quebec tabled before the National Assembly Bill 46, entitled *An Act to amend the Montreal Urban Community Act*, one of the main effects of which would be to establish, on an equal footing, the two parties that make up the urban community of Montreal, namely on the one hand the City of Montreal and, on the other, the surrounding suburbs. This bill would accentuate the powers of the provincial government with respect to the urban community and, while reducing some powers of the City of Montreal, would, within the community, increase those of the surrounding suburbs.

#### SECTION 2 - MUNICIPALITIES AND THE CONSTITUTION

It must be stressed that since our initial Report, cases dealing with the Constitution as it affects the municipalities, especially before the courts of Quebec, have been very few. We have verified reported decisions for 1980 and 1981, as well as, for the same two years, jurisprudence not reported officially but annotated in *Jurisprudence Express*. As we shall point out, the relevant constitutional developments have occurred primarily at the political level.

Nevertheless, there is one decision which, in our opinion, has some significance with respect to the matter at hand and that is the second

*Blaikie*<sup>3</sup> decision concerning the language of legislation and of the courts. It will be recalled that in the first *Blaikie* case, the plaintiffs had contested the validity of certain provisions of Bill 101 and that the Supreme Court of Canada, in its 1979 decision <sup>4</sup> had ruled that those provisions of Bill 101 were *ultra vires* of the National Assembly of Quebec because they contravened Section 133 of the B.N.A. Act. In the second *Blaikie* case, the Attorney General of Quebec, by special petition to the Supreme Court of Canada, requested that it clarify the meaning of its earlier decision. The Court declared, among other things, that Section 133 of the B.N.A. Act did not apply to municipal by-laws and regulations. In arriving at this conclusion, the Court specifically reiterated the traditional jurisdiction of the provinces over municipal institutions (92(8) B.N.A. Act). The Court expressed itself as follows:

Last but not least, municipal institutions constitute a distinct albeit subordinate order of government at the local level, the administration of which is usually in the hands of locally elected mayors and members of council. Their growth and the multiplication of their regulations were inherent in their nature and accordingly foreseeable. Since the provinces were explicitly given the power to make laws relating to those institutions in s. 92(8) of the B.N.A. Act, the absence of any reference to them in s. 133 cannot possibly be viewed as an oversight. It is a purposeful silence to which effect must be given if the intent of the Fathers of the Confederation is to be respected.

Municipal by-laws constitute a separate and distinct class of regulations. As we have seen, they are the legislative enactments of a third level of government clearly contemplated by the B.N.A. Act and yet not mentioned in s. 133. The fact that they may be subject to the control or supervision of the Government by way of required approval or potential disallowance does not alter their municipal character nor the constitutional intent to subtract them from the operation of s. 133 <sup>5</sup>.

Thus, the Court reiterated the subordinate constitutional status of the municipalities and the wide, exclusive and historical jurisdiction of the provinces over municipal institutions. Even though, in referring to municipalities, the Supreme Court speaks of "a third level of government", it clearly indicates that their mode of linguistic operation falls under provincial jurisdiction and that it is not subject to Section 133 of the

B.N.A. Act. Such remarks suggest that the improvement of the constitutional status of municipalities will very likely continue to depend on the provinces.

### SECTION 3 - AT THE POLITICAL LEVEL

We wish to recall two important events which have occurred in Quebec since the publication of our first report: the referendum of May 20, 1980 and the provincial election of April 13, 1981. At least as seen from Quebec, the results of the first event imply the retention of Canadian federalism and the continuation of the power sharing structure existing under the B.N.A. Act. In other words, the constitutional status of municipalities has not been affected by this political event.

The second event, the provincial election of April 1981, means that, for an undetermined period, a political party whose aim is the repatriation to Quebec of all legislative powers, will remain in power. Obviously, in such a hypothesis, Quebec would retain complete jurisdiction over municipalities. These events, as well as the recent evolution of the constitutional debate proper, which we will address in the next section, suggest that since our first report, the political environment has become less favorable to constitutional change including revision of the constitutional status of the municipalities.

### SECTION 4 - CONSTITUTIONAL REFORM

Since our last Report, constitutional debate in Quebec has not specifically been concerned with the question of municipalities. We have examined the relevant documentation and we have found nothing which might indicate that municipalities have drawn special attention in relation to the whole question of constitutional reform. At least this is the case in Quebec. An examination of some of the more important documents only confirms this point. For example, we have considered the proposal for a common provincial position prepared by the Quebec delegation for the September 1980 Federal-Provincial Conference on the Constitution<sup>6</sup>. This document, which identifies the areas of consensus between the various Canadian provinces in the framework of the constitutional reform debate, makes no reference whatever to the municipalities.

In the month following the failure of this September 1980 Federal-Provincial Conference, the Federal Government tabled its constitutional patriation package before Parliament; these proposals will likely be passed by Westminster in the near future. The fact that this federal proposal contains nothing specific on the status of municipalities could well be indicative of the maintenance of the *status quo* for the future. To us it also seems important to emphasize another aspect of this Patriation Bill: even though the proposal goes out of its way to specifically identify the participants in future Federal-Provincial Conferences on the Constitution, it makes no mention of municipalities as possible participants to such conferences<sup>7</sup>. Also, although municipalities are not specifically mentioned in the 1981 patriation package, two of its aspects have special interest for municipalities.

The Charter of Fundamental Rights which is part of the patriation proposal is the first of these aspects and, in this respect, it will be necessary to ascertain the degree to which municipalities will be subjected to the new entrenched Bill of Rights. The second aspect is that raised by Article 36 concerning equalization and regional disparities. This article reads as follows:

36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering economic development to reduce disparity in opportunities; and
- (c) providing essential public services of reasonable quality to all Canadians.

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

This provision suggests a constitutional commitment on the part of the federal and provincial governments not only to promote equality of opportunity for all Canadians, but also to provide all Canadians with essential public services at an acceptable level of quality. This could have a considerable impact on the services provided to Canadian citizens by the municipalities.

As is known, the government of Quebec has firmly opposed this proposed constitutional reform. Two motions were adopted by the Quebec National Assembly, one in October 1981, which received the support of all political parties represented in the National Assembly, and the other in December 1981<sup>8</sup>. The second motion passed by the National Assembly states that it "cannot accept the plan to patriate the Constitution" as worded unless, among other things, the proposed Constitution confirms the right of Quebec not to "be subject to any amendment which would diminish its powers or its rights" as well as the right to receive, if ever such a situation arose, "a reasonable and obligatory compensation".

Moreover, in the context of the dispute which, on this question, has arisen between the governments of Quebec and of Canada, it seems useful to us to refer to the attitude of the government of Quebec, as expressed

in the inaugural message of November 9, 1981 at the opening of the National Assembly <sup>9</sup>. On that occasion, Premier Lévesque said: <sup>10</sup>

In order to have the time to completely reassess Quebec's participation in all these federal-provincial and interprovincial exercises, the government has decided, until such time as is otherwise indicated, to withdraw, at all levels, from these meetings which very often are useless and costly, except however from those which are directly linked to our economic and financial interests.

These events to which we refer seem to us to confirm the view that Quebec will continue to insist upon the maintenance of its traditional jurisdiction over municipalities; this is something we had emphasized in our initial report. Moreover, these events suggest that the present climate does not seem very propitious to the reopening of bilateral discussions involving Quebec and relating either to constitutional reform in general or to municipalities and their constitutional status in particular.

## CHAPTER 4

### FROM THE CHAIRMAN'S CHAIR: A PERSONAL CRITIQUE

...Edward McWhinney

It is too early, as yet, to predict the degree and range of constitutional change to be achieved in any *Phase Two* Constitution-making, or how quickly any such process would in fact be completed. This depends, quite obviously, on political decisions at both the federal and the provincial governmental levels, including the degree of priority to be allocated to further constitutional change in comparison, for example, to other community problems, political, social, or economic.

What is clear, however, is that as a matter of constitutional law, now that the constitutional patriation project (*Phase One* Constitution-making) has been completed with the arrival of the B.N.A. Act from London, there is an express legal obligation on the Prime Minister to convene a "constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces...within one year". (Constitution Act, 1981, s. 37(1)). It is also expressly stipulated that the agenda of such constitutional conference shall - "have included...an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada. (*Ibid.* s. 37(2)). Nothing else being specified, in terms, the agenda remains open-ended and subject to the normal political processes as to inclusion and exclusion of subjects for discussion and negotiation. The same section of the Constitution Act, 1981, specified that "representatives of the (aboriginal) peoples" must be invited to the constitutional conference "to participate in the discussion" on the item concerning them (*Ibid.*, s. 37(2)); and also that representatives of the governments of the Yukon Territory and the Northwest Territories are to be invited to "participate in the discussions" of the constitutional conference on any item on the agenda - "in the opinion of the Prime Minister, directly affects" those Territories.

The conclusion would appear obvious enough: if the Canadian municipalities wish the subject of the future constitutional status of the municipalities to be included in *Phase Two* Constitution-making, they should make representations to the Prime Minister to have that subject listed as a formal agenda item for the constitutional conference that must, under s. 37(1), be convened within twelve months after completion of patriation.

Further, if representatives of the municipalities wish to participate directly in the constitutional conference discussions and debate on such items, they should make representations to the Prime Minister to obtain at least the same right to "participate in the discussions" at the constitutional conference that is conceded to the aboriginal peoples of Canada under

s. 37(2), and to the elected representatives of the governments of the Yukon Territory and the Northwest Territories under s. 37(3).

As to the substance of the municipalities' constitutional position, to be presented either to the constitutional conference convened under s. 37(1) within one year after completion of patriation, or else more generally - there would appear to be no reason for departing from the main principles already discussed in detail in the *First Report*. These principles would involve express constitutional recognition of the *three autonomies* of municipal government today:

- (a) *law-making autonomy* - a defined area of legislative competence to be reserved for municipal government, and to be beyond recall by any other level of government except by some extraordinary process (normally the ordinary constitutional amending processes);
- (b) *financial autonomy* - an area of financial and general fiscal authority to be reserved for municipal government including direct taxing power and the right of participation in intergovernmental tax-sharing agreement and tax-allocation arrangements in one's own right;
- (c) *institutional autonomy* - the right to adopt, and also to amend, by appropriate procedures, one's own charter, without the need for recourse to any other level of government.

As already outlined in the *First Report*, the *three autonomies* of municipal government might be specially entrenched within any new or renewed Canadian federal system. It would, however, be equally appropriate to achieve such constitutional entrenchment of the *three autonomies*, either under the Canadian (federal) Constitution or under provincial constitutions. The former, "federalist" approach would have the advantage of generality of application of the principles throughout Canada, and also, presumably, of simultaneity of application. The exception to this would occur if the Federal Government, on the precedent of the "notwithstanding" clause (s. 32) of the Constitution Act, 1981, should decide to permit individual provinces in effect to "opt out" of application of those principles. The latter, "provincialist" approach might be politically more palatable to any provincial governments sensitive to constitutional "Provincial Rights" arguments, and could, of course, be accompanied by its own special type of "opting out" arrangements, too. The actual choice between the two options would clearly be a highly political one, and therefore beyond the special competence and also the mandate of this Resource Task Force. The most important development would be for the constitutional status of municipalities, and also the *three autonomies*, to be mentioned in the Canadian (federal) Constitution; this would leave only the exact modalities for their concrete achievement - whether under federal or under provincial constitutional law - to be

determined both by the give-and-take of federal-provincial intergovernmental negotiations and by any public political representations brought to bear upon them (including any submissions from elected members of municipal government). As for the concept of a uniform constitutional status, uniformly applied throughout Canada at one and the same time, for municipalities, as opposed to the potential checkerboard quilt of different constitutional status conditions for municipalities to which an "opting-out" provision, under a "notwithstanding" clause or some similar formula, might lead, the political arguments *pro* and *con* would seem to have been amply canvassed already in the more general constitutional debate over s. 32 of the Constitution Act, 1981, without any need to be developed further in the present context. Suffice it to say that, in strict constitutional-legal terms, while uniformity of rule and its actual application may be the norm and no doubt generally desirable, diversity is by no means novel or unusual within a plural federal system and, on many constitutional views, is not necessarily difficult to live with so long as the federal society itself remains viable as a whole.

All these options, and the different constitutional modalities for their achievement would seem properly within the domain of policy choice of popularly-elected representatives like the members of the Federation.

If the Federation should decide it wishes to make its own positive intervention in *Phase Two* Constitution-making, a research programme might usefully be mounted in aid of such initiative, including the following as possible priority subjects for empirically-based research, and with a target date for completion in time for the June 1983, Annual Conference of the FCM:

- (a) tri-level governmental decision-making in Canada: the experience with urban renewal in Quebec City in the early 1970's;
- (b) tri-level governmental decision-making: current regional economic development programmes in the Windsor, Ontario, area;
- (c) provincial transfer grants to municipalities (all provinces): comparative empirical data (from 1979 onwards, to up-date and supplement the material in the *First Report*);
- (d) Section 15 (Equality Rights) of the Canadian Charter of Rights and Freedoms: concrete legal consequences and costs implications at the level of municipal government;
- (e) the *big* (city) municipalities and the *small* municipalities: differentiations, if any, in constitutional status requirements and needs, and in approach to fiscal, tax, and transfer arrangements.



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